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Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES

CALVIN LEWIS ROGERS — PETITIONER

-vs-

UNITED STATES OF AMERICA — RESPONDENT

PETITION FOR CERTIORARI
FROM THE COURT OF APPEALS FOR THE
SIXTH CIRCUIT

ARTHUR CLARK and
JAMES R. RIMEDIO
COUNSEL FOR PETITIONER
914 Main Street
Cincinnati, Ohio, 45202

NO. 73-1095

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA	:	FILED Oct. 24, 1973
Plaintiff-Appellee	:	James A. Higgins, Clerk
v.	:	O R D E R
CALVIN LEWIS ROGERS	:	
Defendant-Appellant	:	

- - - - - - -

Before: EDWARDS and PECK, Circuit Judges, and CECIL, Senior Circuit Judge.

This case having come on to be considered on the record on appeal and on the briefs and oral arguments of counsel for the parties, and the Court being fully advised in premises concludes that the instruments which

admittedly passed in interstate commerce were "falsely made securities" within the meaning of both 18 U.S.C. § 2311 and the indictment herein, and having further concluded that no error prejudicial to the rights of the accused is reflected in the record,

IT IS ORDERED that the judgment of the District Court be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT

s/s James A. Higgins
Clerk

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QUESTIONS PRESENTED

WHETHER THE HOLDING BY THE UNITED STATES COURT OF APPEALS THAT CONDITIONAL SIGHT DRAFTS PAYABLE ONLY UPON SIGHT AND APPROVAL, TO BE SECURITIES WITHIN THE PURVIEW OF SECTIONS 2311 and 2314, TITLE 18, UNITED STATES CODE, WAS A DENIAL OF DUE PROCESS OF LAW UNDER AMENDMENTS V AND XIV OF THE CONSTITUTION OF THE UNITED STATES.

WHETHER THE INSTRUCTION TO THE JURY IN EFFECT REMOVED THE REAL QUESTION IN ISSUE FROM ITS REALM OF CONSIDERATION THEREBY DEPRIVING THE PETITIONER OF DUE PROCESS OF LAW UNDER THE PROVISIONS OF AMENDMENTS V AND XIV OF THE CONSTITUTION OF THE UNITED STATES

CONSTITUTIONAL PROVISIONS

CONSTITUTION OF THE UNITED STATES:

AMENDMENT V. No person shall be deprived * * * of life, liberty or property without due process of law.

AMENDMENT XIV All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside, No State shall * * deprive any person of life, liberty or property without due process of law.

SUPREME COURT OF THE UNITED STATES

CALVIN LEWIS ROGERS PETITIONER

-vs-

UNITED STATES OF AMERICA RESPONDENT

PETITION FOR CERTIORARI
FROM THE COURT OF APPEALS FOR THE
SIXTH CIRCUIT

The petitioner herein prays that a Writ of Certiorari be issued by the Supreme Court to the United States Court of Appeals for the Sixth Circuit for review of a Judgment entered by the said United States Court of Appeals for the Sixth Circuit dated October 24, 1973 affirming the Judgment of the United States District Court for the Southern District of Ohio in the within cause.

The Opinion of the said United States Court of Appeals for the Sixth Circuit is appended hereto as Appendix No. 1.

The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 United States Code. The petitioner is a party to a criminal action on which judgment was rendered in the United States Court of Appeals for the Sixth Circuit affirming a Judgment of the United States District Court for the Southern District of Ohio.

STATEMENT OF THE CASE

On December 14, 1971 the petitioner was indicted by the United States Grand Jury for the Northern District of Ohio for violation of section 2314 of the United States Code, Title 18.

The petitioner stood trial upon this indictment before a jury in the United States District Court for the Northern District of Ohio, which trial was presided over by Honorable Nicholas J. Walinski, United States District Judge for such district, and on December 18, 1972 the said Court entered an Order of Conviction and sentenced to serve six (6) years imprisonment thereon.

Notice of Appeal was timely filed with the briefs being timely filed, and on October 24, 1973 the United States Court of Appeals for the Sixth Circuit entered its Judgment of Affirmance of the conviction and sentence.

It is from this Opinion of the United States

Court of Appeals for the Sixth Circuit that this review by the Supreme Court is petitioned.

STATEMENT OF FACTS

This case involves the alleged attempted negotiation of certain written instruments into the banking system.

The evidence involves the deposit of certain 'drafts' written against the Countrywide Insurance Company through its banking institution at the Bank of America, which 'drafts' were payable "Upon sight, when approved, payable to the Order of:"

These instruments were deposited in savings accounts by means of a "split deposit" under which a portion of the deposit was returned at the time to the depositor in cash, and the draft was then routed through normal banking channels for collection.

The uncontradicted evidence was that these instruments were conditional sight drafts and were not unconditionally negotiable.

In its Opinion the United States Court of Appeals for the Sixth Circuit found the instruments to be "securities" within the meaning of section 2311 and section 2314 of Title 18, United States Code, and by latent inference approved Judge Walinski's instruction to the jury that it was the jury's duty to "determine whether this is a security as used in the statute, or a check as limited by the indictment".

WHETHER THE HOLDING BY THE UNITED STATES COURT OF APPEALS THAT CONDITIONAL SIGHT DRAFTS, PAYABLE ONLY UPON SIGHT AND APPROVAL, TO BE SECURITIES WITHIN THE PURVIEW OF SECTIONS 2311 AND 2314, TITLE 18, UNITED STATES CODE, WAS A DENIAL OF DUE PROCESS OF LAW UNDER AMENDMENTS V AND XIV OF THE CONSTITUTION OF THE UNITED STATES.

Section 2314 of Title 18, United States Code establishes a violation of the federal law for transporting in interstate commerce a falsely made or altered security, as the term security is defined in section 2311 of such Title.

The indictment referred to the instruments in question as 'checks'.

The instruments in question bear the legend: "upon sight, when approved, payable to the order of:"

Are such instruments 'securities' within the meaning of section 2311 of Title 18, U.S.C.?

The petitioner submits that they are not.

The petitioner has been unable to locate any decisions by the Supreme Court interpreting sections 2311 or 2314 in connection with the question presented herein.

The United States Court of Appeals for the Fifth Circuit, however held in Merrill v. United States (1964) 338 F. 2d 763

> "It seems to this Court that the term 'security' was used by congress to refer to negotiable instruments which in themselves had monetary value * * *"

This decision by the Fifth Circuit was later cited with approval in Beam v. United States (U.S.C.A. 6th 1966) 364 F. 2d 756.

Thus the question presented here appears to depend upon whether the instruments involved were negotiable.

In 11 AmJur (Bills and Notes) sec. 138, 141 and under sections 1303.03(A)(2) and 1303.03(A)(4) of the Ohio Revised Code, a negotiable instrument must be an unconditional promise to pay.

Moreover, in Jerome v. Eastern Finance Co. 317 Mass. 364, 58 N.E. 2d 122, it was specifically held that an insurance company claim draft, payable 'upon acceptance' was conditional and not negotiable.

In this connection the case of United States v. Canton 470 F. 2d 861 appears to further clarify this question, wherein it was held that securities are instruments having intrinsic value and which are used in regular channels of commerce; and as defined in Columbia Encyclopedia (3d Ed. 1968) securities are 'instruments giving to their legal holders rights to money or other property'.

Accordingly, it appears that the instruments involved in the present litigation should not be held to be securities within the intent and meaning of section 2311 and 2314 of Title 18, United States Code.

The instruments in question, being payable only 'upon sight after approval' are clearly conditional and not absolute, thus not negotiable.

Indeed, the instruments here under scrutiny are not payable 'by' the Bank of America, but are payable 'through' the said bank, only after approval by the Countrywide Insurance Company.

Section 3-120 of the Uniform Commercial Code (Ohio Revised Code, sec. 1303.19) provides

> " * * * An instrument which states that it is 'payable through' a bank designates that bank as a collecting bank to make presentment but does not of itself authorize the bank to pay the instrument * *"

A serious question therefore exists as to whether such conditional drafts are truly 'securities' as that term is used in section 2311 defining the instruments which may not be transported in interstate commerce without violation of section 2314 of such Title.

Where a doubt exists as to whether a certain activity comes within the scope of a penal statute, such doubt must be resolved against the broadening of the statute to encompass such activity, unless the statutory language clearly suggests that such activity is included thereunder. United States v. Adielizzio 77 F 2d 841; Fasulo v. United States 272 U.S. 620.

Penal statutes must be strictly construed in favor of the accused, Preston v. United States 282 U.S. 675, and where any ambiguity exists, such ambiguity may not be resolved by embracing offenses not clearly within the statute. Krickman v. United States 256 U.S. 356.

Although the issue herein presented may only affect this one citizen, and although there may have been some violation of the laws of Ohio, it is submitted that the verdict and Judgment of the trial court and the affirming Opinion of the United States Court of Appeals appear to have resulted in an extension of the federal law into an area of criminal law which is specifically reserved to the State of Ohio, and it is further submitted that certiorari is justified under Rule 19 of the Rules of the Supreme Court by reason of the fact of an Opinion of a Court of Appeals which appears to be in conflict with the accepted and usual rules of law and of constitutional and statutory interpretation that the supervisory powers of this Court should be exercised.

WHETHER THE INSTRUCTION TO THE JURY IN EFFECT REMOVED THE REAL QUESTION IN ISSUE FROM ITS REALM OF CONSIDERATION THEREBY DEPRIVING THE PETITIONER OF DUE PROCESS OF LAW UNDER THE PROVISIONS OF AMENDMENTS V AND XIV OF THE CONSTITUTION OF THE UNITED STATES

In its instruction to the jury Judge Walinski stated that it was the jury's duty to:

> "determine whether this is a security as used in the statute, or a check as limited by the indictment."

The real question before the jury was whether the instruments in question were securities.

The language utilized by Judge Walinski appears to limit the consideration of the jury to whether the instruments were securities or checks, rather than whether the instruments were securities.

It is submitted that the said instruction effectively deprived the petitioner of a fair trial and due process of law by the expedient of removing from the consideration of the jury the principal question of whether in fact the instruments were securities at all.

For this reason it is submitted that certiorari is justified under Rule 19 upon the grounds that the opinion of the Court of Appeals affirms an action of the trial court which was a departure of the accepted and usual

course of judicial proceedings as to call for the exercise of the supervisory powers of the Supreme Court to remedy a gross miscarriage of justice.

CONCLUSION

For the reasons set forth herein the petitioner requests that the Supreme Court of the United States grant to him a Writ of Certiorari to review his conviction and the affirming opinion of the United States Court of Appeals.

ARTHUR CLARK and
JAMES R. RIMEDIO
COUNSEL FOR PETITIONER
914 Main Street
Cincinnati, Ohio, 45202
381-0025

CERTIFICATION OF SERVICE

It is hereby certified that service of the within Petition for Certiorari has been made by mailing four (4) copies thereof to the Office of the Solicitor General of the United States at his office at Department of Justice, Washington, D. C., 20530, and by mailing four (4) copies thereof to the office of the United States Attorney at his office at 212 United States Courthouse, Toledo, Ohio, 43624, all done this 23 day of November, 1973.

ARTHUR CLARK and
JAMES R. RIMEDIO
COUNSEL FOR PETITIONER
914 Main Street
Cincinnati, Ohio, 45202.